82-320

No. _____

Office - Supreme Court, U.S.
FILED
AUG 19 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

EARL J. HARRINGTON,
SHERRI A. ATKINSON,
GOLDEN WEST ESCROW COMPANY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNER, BUZARD, LARSON
& McINTYRE

BY: GLENN J. BUZARD

Suite 901
16633 Ventura Boulevard
Encino, CA 91436
(213) 990-0310

Attorneys for Petitioners

QUESTIONS PRESENTED

I

Whether convictions for the crimes of mail fraud, in violation of 18 U.S.C. §1341, and conspiracy to commit mail fraud in violation of 18 U.S.C. §371, can be premised upon mailings which were subsequent to the alleged scheme reaching fruition when the mailings served only to increase the likelihood of detection of the alleged scheme.

II

May the government, during the cross-examination of a co-defendant, impeach that co-defendant with his previously suppressed involuntary statment when the proferred statement is utilized for the purpose of incriminating the petitioners.

PARTIES TO THE PROCEEDING IN LOWER COURT

Plaintiff: United States of America

Defendants: Earl J. Harrington

Sherri A. Atkinson

Golden West Escrow Company

Joseph Singfield Miller

Central Financial Corporation

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
TABLE OF AUTHORITIES	5
OPINIONS BELOW	6
JURISDICTION	6
CONSTITUTIONAL PROVISIONS INVOLVED	6
STATUTES INVOLVED	7
STATEMENT OF THE CASE	10
REASONS FOR GRANTING THE WRIT	16
I THE MAILINGS UPON WHICH THE 18 U.S.C. §1341 CONVICTIONS WERE BASED OCCURRED SUBSEQUENT TO THE FRUITION OF THE SCHEME, (2) WERE NOT FOR THE PURPOSE OF EXECUTING THE SCHEME, AND (3) SERVED ONLY TO INCREASE THE LIKELIHOOD OF DETECTION. THE CONVICTIONS THEREFORE VIOLATE THE PRINCIPLES OF THIS COURT ANNOUNCED IN UNITED STATES v. MAZE, 414 U.S. 395, 94 S. Ct. 645 (1974) and KANN v. UNITED STATES, 323 U.S. 96, 65 S. Ct. 148 (1944).	16

TABLE OF CONTENTS
Continued

		Page
II	THE GOVERNMENT'S USE OF CO-DEFENDANT MILLER'S INVOLUNTARY STATEMENT FOR IMPEACHMENT PURPOSES VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS INTERPRETED BY THIS COURT IN MINCEY v. ARIZONA, 437 U.S. 396, 98 S. Ct. 643 (1971)	23
CONCLUSION		37
APPENDIX A	OPINION, UNITED STATES COURT OF APPEALS, NINTH CIRCUIT, ARGUED AND SUBMITTED APRIL 9, 1982.	
APPENDIX B	PETITION FOR REHEARING DENIED, UNITED STATES COURT OF APPEALS, NINTH CIRCUIT.	

TABLE OF AUTHORITIES

Cases

	Page
Kann v. United States 323 U.S. 96, 65 S. Ct. 148 (1944)	16,17
Mincey v. Arizona 437 U.S. 396, 98 S. Ct. 643 (1971)	23,36
United States v. Ballard 586 F. 2d 1060 (5th Cir., 1978)	34
United States v. Galloway 664 F. 2d 161 (7th Cir., 1981)	16,21
United States v. Maze 414 U.S. 395, 94 S. Ct. 645 (1974)	16,17
United States v. Tingle 658 F. 2d 1332 (9th Cir. 1981)	34

STATUTES

18 U.S.C. § 371	1,7,11
§ 1014	8,11
§1341	1,9,10,11,16
28 U.S.C. 1254 (i)	6

OPINIONS BELOW

The unpublished opinion of the Court of Appeals for the Ninth Circuit is set forth hereafter as Appendix A.

The denial of the Petition for Rehearing is set forth hereafter as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on May 3, 1982. A timely filed petition for rehearing and suggestion for rehearing in banc was denied on June 21, 1982. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (i).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on

a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES INVOLVED

18 U.S.C. §371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. §1014

Whoever knowingly makes any false statement or report, or wilfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131-1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a joint-stock land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Fed-

eral Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

18 U.S.C. §1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fradulent pretenses, representation, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spuriour article, for the purpose of executing such

scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Services or takes or received therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Petitioner, Earl J. Harrington (Harrington), Sherrie A. Atkinson, (Atkinson) and Golden West Escrow (GWE) were charged by indictment, along with co-defendants Joseph Singfield Miller (Miller) and Central Financial Corporation (CFC), with mail fraud in violation of 18 U.S.C. §1341, making false statements to federally insured institutions

in violation of 18 U.S.C. §1014, and 18 U.S.C. §371, conspiracy to commit mail fraud and to make false statements.

After jury trial plaintiffs were convicted of one count of conspiracy, twelve §1014 counts, and four §1341 counts. GWE was convicted of an additional §1341 count.

Re 18 U.S.C. §1341 counts:

The scheme devised and executed by co-defendant Miller which forms the basis of the mail fraud counts was basically admitted in his own testimony and can be briefly summarized as follows:

Miller testified that he, acting as co-defendant Central Financial Corporation, became involved in foreclosure property in 1977. Miller stated that he studied foreclosure procedures and practice and that he developed a program. This program

would allow a homeowner faced with foreclosure problems to remain in his home, and to have all of his encumbrances paid. This would be accomplished by obtaining a new loan with another lender.

Miller testified that he would inform the homeowner that he must deed his property to CFC so Miller could "control the situation." The homeowner would be informed that a third party would be obtained to secure the new loan in the name of the third party and based upon the credit of the third party. An escrow would be opened wherein defendant CFC would deed the property to the third party.

Miller would interview the third party, fill out a loan application, and take that application and submit it to a loan broker.

It was never Miller's intention that the third party occupy or intend to occupy the property, or to make the downpayment on the purchase of the property. After securing the loan, the third party would deed the property back to the original owner. By procuring the new loan and obtaining the proceeds of the sale to the third parties, Miller effectively appropriated the equity which the original homeowners had in their properties.

Appellants Harrington and Atkinson were the president and secretary, respectively, of Golden West Escrow Company, the escrow on the various transactions.

The mailings which gave rise to the five mail fraud counts against Harrington, Atkinson and Golden West

Escrow were those which occurred when, after the close of escrow and after Miller had received the proceeds of sale, the Los Angeles County Recorder's office mailed the originals of the recorded grant deeds to the third party buyers. These deeds were mailed to the properties which were involved in the various transactions, addressed to the new buyers. At the time of the mailings, the original homeowners, who testified that they did not know their homes were being sold by Miller, still lived in the properties.

Re Use of Codefendant Miller's Involuntary Statement.

Prior to trial, co-defendant Miller moved to suppress his estrajudicial statements to FBI Agent Freking, which statements incriminated petitioners. The

statements were suppressed; however, the court permitted the government, during the cross-examination of Miller, to use the statements for impeachment purposes. The government has conceded that appellants have standing to object to the use of the statements.

The statements in question were obtained by Agent Freking during a series of thirteen non-custodial interviews over a twenty-two day period.

At the conclusion of the suppression hearing, the trial court, citing the totality of the events, and making reference to the threats and promises made by the agent, suppressed the statements.

At trial, however, the court allowed the government to use the statements to impeach the testimony of Miller

that petitioners were not involved in his scheme.

REASONS FOR GRANTING THE WRIT

I

THE MAILINGS UPON WHICH THE 18 U.S.C. §1341 CONVICTIONS WERE BASED OCCURRED SUBSEQUENT TO THE FRUITION OF THE SCHEME, (2) WERE NOT FOR THE PURPOSE OF EXECUTING THE SCHEME, AND (3) SERVED ONLY TO INCREASE THE LIKELIHOOD OF DETECTION. THE CONVICTIONS THEREFORE VIOLATE THE PRINCIPLES OF THIS COURT ANNOUNCED IN UNITED STATES v. MAZE, 414 U.S. 395, 94 S. Ct. 645 (1974) and KANN v. UNITED STATES, 323 U.S. 96, 65 S. Ct. 148 (1944).

As set forth more fully supra, petitioners were convicted of mail fraud, the convictions being founded upon the Los Angeles County Recorder's Office's act of mailing original grant deeds, following their recordation, to the mailing addresses of the properties conveyed by the respective deeds.

At the time of these mailings, which were subsequent to the close of escrow, co-defendant Miller had completed his scheme to defraud the original property owners of the equity in their homes and he was in possession of the proceeds of the various escrows. At this point, however, the original owners were unaware of Miller's actions and still lived in the homes to which the recorder's office mailed the deeds.

Petitioners, relying on the authority of United States v. Maze, 414 U.S. 395 (1974) and Kann v. United States, 323 U.S. 88 (1944), have therefore asserted that the mailings were not for the purpose of executing the scheme, in that, by the time of the mailings, co-defendant Miller had already obtained the money, thus bringing his scheme to

fruition.

In answering petitioners' claim, the Opinion of the Court of Appeals cites United States v. Galloway, 664 F.2d 161 (7th Cir., 1981) (decided after the completion of briefing in the instant matter), for the proposition that "a fraudulent scheme may depend on a mailing even after the defrauders have received their money." While this may be true as a proposition of law, it is absolutely inapplicable to the present matter. Even aside from the fact that no decision has ever stretched the mail fraud statute to the extended limits that the Seventh Circuit adopted in Galloway, the Galloway decision itself clearly distinguishes the species of mailing which occurred in the instant case.

In Galloway, an odometer rollback case, the court found, over vigorous dissent, that the intended victims of the fraudulent scheme were retail automobile purchasers, that the mailing of title documents to said purchasers was an integral part of the scheme, and that the scheme thus depended on a mailing even after the defrauder received his money.

The contrast to the present case is marked. The mailing of the recorded deeds, addressed to the third party buyers, had absolutely nothing to do with Miller's scheme. Those buyers never intended to claim or occupy the properties and their receipt of those deeds in no way contributed to Miller's receipt of the money. In other words, Miller's scheme to obtain money in no way depended on the subsequent mailing of the deeds. In fact, as petitioners

have argued, the mailing of the deeds served only to increase the likelihood that Miller's scheme would be discovered. The mailings, which were deeds showing that Miller had sold the properties, were sent to properties occupied by the original homeowners. Those homeowners testified at trial that they did not know Miller was going to sell their homes. The only possible result of the mailings was that an original homeowner would find out that he had been lied to by Miller.

It is this second point, i.e., that the mailings increased the likelihood of detection, that the Opinion of the Court of Appeal fails to appreciate. Even the Galloway decision, the sole authority relies upon the Opinion in upholding the convictions, takes pains to

distinguish such a circumstance and makes clear that no liability can attach where the mailing is "counter-productive" (664 F 2d at 165), and is one which "increased the probability that the fraudulent scheme would be detected" (664 F.2d at 164). As Galloway explained, if the title documents which were mailed had included odometer readings, this inclusion would have made detection of an odometer rollback scheme more likely, and thus mail fraud liability could not be predicated upon such mailings. 664 F. 2d at 165 fn. 7. This reasoning is equally applicable to the present matter. If the inclusion of odometer readings in a title document might increase the chance of discovery of an odometer rollback scheme, it can hardly be dis-

puted that mailing a victim a document showing that his property has been sold to a stranger might make that victim's detection of a real estate scheme more likely.

Thus, petitioners submit that:

(1) They have demonstrated that Miller's scheme and receipt of the funds did not depend on the subsequent mailing of the grant deeds, and that the Opinion's citation of Galloway, supra, is thus inapposite and no legitimate basis for upholding the convictions; and

(2) That the mailing made detection of the scheme more likely and that under the holding of both Maze, supra, and Galloway, supra, this fact alone requires reversal of the convictions.

II

THE GOVERNMENT'S USE OF CO-DEFENDANT MILLER'S INVOLUNTARY STATEMENT FOR IMPEACHMENT PURPOSES VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS INTERPRETED BY THIS COURT IN MINCEY v. ARIZONA, 437 U.S. 396, 98 S. Ct. 643 (1971)

The statements of co-defendant Miller, which were suppressed prior to trial, were the product of a series of thirteen non-custodial interviews with FBI Agent Freking. At trial, Miller, although claiming innocence, testified and admitted all the elements of the crimes with which he was charged, and, in fact, described in detail how he deceived the federal insured lenders. He also testified that petitioners, who acted as the escrow on the various transactions, had no knowledge of the nature of his scheme. At this point,

over petitioners' objections, the government was permitted to impeach Miller with the previously suppressed statements, and taking full advantage of this opportunity, went through every statement Miller allegedly made to the agent regarding the guilty knowledge of petitioners Harrington and Atkinson.

On appeal, petitioners asserted that the trial court, in its ruling on the suppression matter, had found Miller's statement to be involuntary, and that the statements were inadmissible for any purpose. In ruling on this claim of error the Opinion of the Court of Appeal disregarded the ruling of the trial court on the motion to suppress, and purported to sustain a trial court finding that Miller's

statement was voluntary. The mistake of such a holding is that the trial court did not find Miller's statements to be voluntary, rather, they were found to be involuntary. Thus, in denying petitioners' claim, the Court of Appeal has sustained a trial court finding which did not exist, thereby avoiding the necessity of deciding petitioners' Mincey, supra, argument.

The testimony and ruling on the motion to suppress can fairly be summarized as follows:

Co-defendant Miller testified that Agent Freking told him at the first meeting that he would not need a lawyer if he cooperated. (R.T. 46A). Freking also told Miller that he knew of Miller's diversion status in Colorado and that he would have Miller sent back there for the next two years. (R.T. 47A).

Freking further told Miller that he was guilty of mail fraud and conspiracy and the total sentence would be sixty years. (R.T. 50A). Agent Freking also told Miller he could be an undercover worker for the FBI and that, if he cooperated, Freking would help get him a job with Home Savings. (C.T. 65).

Freking testified that he told Miller that Miller might be able to convince him that Miller was innocent. (R.T. 17A). Freking also told Miller that if Miller could provide information about other people, that this would be conveyed to the U.S. Attorney's Office, and that it would be considered by them in making a decision whether or not to prosecute. (R.T. 19A, 20A). Freking also described the maximum penalties to Miller so Miller would know what his

maximum exposure was. (R.T. 21A, 22A). Freking probably told Miller his sentence would be 49 years. (R.T. 23A). Freking also discussed the possibility of a violation on Miller's Colorado diversion. (R.T. 26A). Freking told Miller that he had caused the arrest and imprisonment of someone in Arizona on a similar case. (R.T. 27A). Freking also discussed with Miller the possibility of Miller going to work for Freking in a private business Freking was just setting up. (R.T. 31A, 32A). Freking told Miller that if he could get over his problems, Freking would be more than willing to put him to work. (R.T. 33A). He told Miller that he would need someone that could handle the phones and take loan applications. (R.T. 34A).

As briefly noted above, the Opinion of the Court of Appeal makes two assumptions regarding the suppression hearing and the trial court's ruling on the motion.

(1) The Opinion states at page 15, fn. 3: "The record shows that the appellants' stressed the Miranda violations in their motion to suppress, and that the statements were barred on that ground;" and

(2) The Opinion states at page 17: ". . . in our view the district court correctly held that the evidence did not show that Miller's will was overborne, or that his statements were coerced."

Neither of the above quoted statements find any support whatsoever in the record and the statements are

simply erroneous.

As to the Opinion's first assertion that the petitioners stressed the Miranda violations, simple reference to counsel's argument on the motion disproves the claim. Counsel for Miller, Mr. Walsh, at the commencement of his argument, stated:

> . . . The motion is basically on two grounds. One, we argued that the Agent should have given the full Miranda warnings at the outset of all the interrogations and, two, that the statements are involuntary.
>
> I think that the stronger argument is that the statements were involuntary . . .(R.T. 63A).

It is thus clear that the thrust of the motion was that Freking's threats and promises rendered Miller's statement involuntary. The argument of the government on the motion also illustrates that the real issue being litigated was the

voluntariness of the statement. Mr. Perez, the prosecutor, in making his argument, gave a very brief recitation of the law regarding Miranda, and pointed out its inapplicability because Miller was not in a custodial setting during the interrogations.

> The test is clear, that is, the custodial interrogation test, and that did not occur here. (R.T. 71A).

Mr. Perez then made no further mention of Miranda and devoted the entirety of his argument to the voluntariness question, prefacing the argument with the following remarks:

> Moving on, sir, to the second issue, the question on whether the statements were involuntarily made, the government, your Honor, has the burden of proof and the burden there is a preponderance of the evidence.
>
> Whenever the statements are challenged on the basis that they are involuntarily made the government has that burden, and we

accept that burden. (R.T. 71A, 72A).

Upon the conclusion of Mr. Perez' argument regarding voluntariness, the trial court stated:

> THE COURT: Thank you, Mr. Perez. And indeed I want to compliment you for making what I considered a very obvious kind of case much closer.
>
> MR. PEREZ: Thank you, sir.
>
> THE COURT: But, yet, I don't feel that the government has been able to carry its burden. And it is not, certainly, your fault, Mr. Perez. As I say, you argued quite well. (R.T. 77A, 78A).

This statement by the trial court that the government had not met its burden was a clear reference to the government's argument on voluntariness and must be considered as a finding that the government had failed to meet its burden of proof on that issue.

Petitioners submit that the Opinion's assertion that the Miranda issue was stressed at the hearing and that the ruling was based on Miranda, is completely in error. It is undeniable that the argument and the ruling related to the involuntary nature of Miller's statements.

The second assumption of the Opinion quoted above, i.e. that the district court held Miller's will not to have been overborne, is equally erroneous. The trial court did not make any such finding. Rather, the district court did exactly the opposite, finding that, based upon "the totality of the events" and that when "we add it up, it all points to the fact that the motion to suppress has to be granted indeed." (R.T. 78A).

Because the ruling of the trial court is so crucial to this issue, petitioners, recognizing some repetition, now quote the ruling, in its entirety:

> THE COURT: But, yet, I don't feel that the government has been able to carry its burden. And it is not, certainly, your fault, Mr. Perez. As I say, you argued quite well.
>
> It seems to me, though, that looking at the totality of the events here that the government in the handling of this matter could not quite agree, it seems to me, in the final analysis, that there is no way we could use the statements.
>
> The agent not only was inappropriate in talking about some moonlighting, but it appears to me that the use of that further lulled this defendant into making whatever statements he made, whether they were all incriminatory or not. Nevertheless, I doubt seriously that he would have made them if he had been advised that anything he stated could and would be used against him.
>
> More than that --- or I should say less than that, the subtleness of the Colorado matters,

> all of this, we add it up, it all points up the fact that the motion to suppress has to be granted indeed.
>
> That will be the order. The motion is granted. (R.T. 78A).

It is inconceivable that this ruling could be interpreted as a finding that Miller's will was not overborne. It is obviously an exactly opposite finding. The court's language in the ruling is a virtual parallel of the "totality of the circumstances" test for voluntariness set forth in United States v. Ballard, 586 F 2d 1060 (5th Cir., 1978), citing Boulden v. Holman, 394 U.S. 478. The remainder of the ruling is devoted to those kinds of considerations called for by United States v. Tingle, 658 F 2d 1332 (9th Cir., 1981) and the cases there cited. These cases, although cited by petition-

ers in their briefs, were completely ignored by the Opinion.

It is clear that, in making its ruling, the trial court did consider the agent's failure to warn Miller, and that this failure to warn was one of the several factors which led the Court to believe that Miller's will had been overborne. The trial court thus found that Miller had been promised employment, threatened with diversion revocation, lulled into making statements, that he had not been advised of rights, and that when all these points were added up, the statement had to be suppressed.

The only reasonable interpretation of this ruling is that it is a finding of involuntariness. After such a ruling, it was error for the court to permit impeachment of Miller with the

statements, which were offered in order to incriminate Harrington, Atkinson, and Golden West Escrow, at the time of trial. Mincey v. Arizona, 437 U.S. 396 (1978). The prohibition on the use of such statements is absolute and the judgments must therefore be reversed.

CONCLUSION

For any or all of the foregoing reasons, petitioners submit that a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

KENNER, BUZARD, LARSON & McINTYRE

By _____
GLENN S. BUZARD, Attorneys for Petitioners

APPENDIX A

APPENDIX A

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

JOSEPH SINGFIELD MILLER,
SHERRI A. ATKINSON,
GOLDEN WEST ESCROW COMPANY,
EARL J. HARRINGTON,
Defendants-Appellants.

Nos. 81-1287, 81-1331,
81-1332, 81-1333.

United States Court of Appeals,
Ninth Circuit.

Appeal from the United States District Court for the Central District of California, Terry J. Hatter, Jr., District Judge, Presiding.

Argued & Submitted: April 9, 1982

Decided:

Before: WRIGHT and SNEED, Circuit Judges, and SOLOMON,*

SOLOMON, Judge:

Appellants, Joseph Miller, Sherri Atkinson, Earl Harrington, and Golden West Escrow Company (Golden West) were convicted of conspiracy to commit mail fraud, and to make or cause to be made false statements to federally insured

* Hon. Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

savings and loan associations in violation of 18 U.S.C. §§ 371, 1341, and 1014. They were also convicted on fourteen substantive counts of making and causing the making of false statements to federally insured savings and loan associations, in violation of 18 U.S.C. §1014, and of mail fraud, in violation of 18 U.S.C. §1341. Miller was also convicted of seven additional counts of mail fraud and one other count of making false statements to a federally insured savings and loan association. Golden West was also convicted of another count of mail fraud.

On appeal, appellants assert that the district court improperly interpreted the mail fraud statute. They also assert that the evidence is insufficient to sustain their convictions and that the district court made erroneous

evidentiary rulings.

The evidence showed that all appellants participated in a fraudulent scheme which purported to assist seven homeowners to avoid the foreclosure of their homes. According to the scheme, a homeowner who answered Miller's newspaper advertisements would be invited to meet in Miller's office, where Miller would explain his refinancing program. The homeowners would then deed their homes to Miller's company, the Central Finance Corporation (CFC), in order to prevent creditors from filing liens and judgments against the homes. The deeds were recorded by the County Recorder's Office, and copies were mailed to CFC. Those mailings are the basis for seven of the mail fraud counts.

Miller would then find third parties to act as "straw purchasers" of

the homes. The straw purchasers completed loan applications and other documents which stated that they would be the new owners and occupants of the homes. None of the straw purchasers actually intended to occupy any of the homes. They submitted the documents to federally insured savings and loan associations for the ostensible purpose of purchasing the homes from CFC.

The escrows were handled by appellants Harrington and Atkinson, employees of Golden West. When a lending institution sent Golden West proceeds of the loan, the escrow was closed, and the new loan became the new mortgage on the property. The proceeds from each new mortgage paid the balance of the existing mortgage which was in default; any remaining proceeds became Miller's fee. At the close of the escrow, CFC would deed the property to the straw purchaser, who would then deed

it back to the homeowner. The homeowner would then be required to make the payments on the new mortgage, which payments would be higher than those of the old mortgage. In five of the seven transactions, the County Recorder mailed a copy of the recorded deed to the straw purchaser at the address of the house.

The evidence showed that the straw purchasers did not provide the down payments for the sales. Atkinson and Harrington lent the straw purchasers the down payment money; these loans were immediately repaid to Atkinson and Harrington, together with interest and high fees. Repayment checks were exchanged through Cal Coast Financial Corporation, a former employer of Harrington's, to hide the fact that Golden West was making the loans to the staw purchasers. In five of the seven

transactions, Atkinson prepared Golden West receipts which falsely indicated that she had received the down payments from the straw purchasers.

Each loan application falsely stated that the straw purchasers had not borrowed the down payments. Five of the applications falsely stated that the down payments came from savings and earnings.

In one transaction, the savings and loan association required employment verification for the straw purchaser's wife. Miller falsely provided this verification.

These transactions greatly increased the homeowners' monthly mortgage payments. Most of the homeowners' equity was liquidated for Miller's financial gain, and foreclosures were merely postponed because the homeowners could not

meet the increased monthly charges.

I. MAIL FRAUD COUNTS

All of the mail fraud counts are based on copies of recorded deeds mailed by the Los Angeles County Recorder's Office.[1/] These mailings are divided into two groups: (1) copies of deeds from homeowners to CFC, and (2) copies of deeds mail to straw purchasers after the loans were approved and the escrow closed.

The appellants contend that the mail fraud statute does not apply to

---

1/ The mail fraud statute, 18 U.S.C., §1341, provides in part:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail, any matter or thing whatever to be sent or delivered by the Postal Service . . . or knowingly causes to be delivered by mail . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both".

either set of mailings because the mailings were merely incidental to the scheme. Appellants assert that unless the mailing is to assist in the execution of the scheme, the statute does not apply. They cite United States v. Maze, 414 U.S. 395 (1974), and Kann v. United States, 323 U.S. 88 (1944) but in each of those cases, the fraud was completed before each mailing, the mailings did not further the fraudulent scheme, and the use of the mail was not essential to the consummation of the scheme.

In Pereira v. United States, 347 U.S. 1, 8-9 (1953), the Court stated:

> It is not necessary that the scheme contemplate the use of the mails as an essential element ... Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he "causes" the mails to be used. United States v. Kenofskey, 243 U.S. 440.

Miller knew that the mails would be used in the ordinary course of business. The mailings were an integral part of the scheme. Miller acknowledged that each property was transferred to CFC to prevent creditors from filing liens and judgments against the property, acts which would have prevented him from refinancing. Miller also acknowledged that he wanted and needed the mailed copies to establish ownership and his ability to transfer title. He also wanted the recorded deeds for precise descriptions of the property.

A fraudulent scheme may depend on a mailing even after the defrauders have received their money. United States v. Galloway, 664 F.2d 161, 163 n.3 (7th Cir. 1981). Even after Miller took his "fee", his scheme required the straw purchaser to deed that property back to the home-

owner. Only then was the transaction complete.

We hold that the mailings here satisfy the requirements of the mail fraud statute.

II. MAIL DELIVERY OF ESCROW INSTRUCTIONS

Golden West is the only party charged in Count 10, a mail fraud count based on the delivery of a letter with certified escrow instructions. Golden West contends that the evidence was insufficient to show that the letter was mailed instead of hand-delivered. A Golden West employee testified that all documents that were hand-delivered were marked "delivered", but admitted that there were some exceptions. The document here was not marked "delivered". This evidence was sufficient to enable the jury to find that the letter was mailed. See United States v. Brackenridge, 590 F.2d 810 (9th

Cir.), cert. denied, 440 U.S. 985 (1979).

III. SUFFICIENCY OF EVIDENCE

Harrington, Atkins, and Golden West all contend that there was insufficient evidence that they knew about Miller's scheme. They contend that they merely performed routine escrow services in the seven transactions.

In reviewing the sufficiency of evidence, the standard is whether a rational juror could conclude from the evidence that the defendants are guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979).

The evidence showed that Harrington and Atkinson provided the down payment in the seven transactions, and that they received almost $6,000 of the escrow funds as interest and fees. They exchanged checks with Cal Coast Financial Corporation in order to conceal the receipt of this money.

Harrington also lied when he told an FBI agent that he did not know what Cal Coast was. Atkinson filled out Golden West forms acknowledging receipt of down payments from the straw purchasers. Even though acting through a third party, she provided the down payment in at least one of those transactions.

Harrington and Atkinson were officers of Golden West; their knowledge and acts are imputed to Golden West. United States v. Beusch, 596 F.2d 871, 878 n.7 (9th Cir. 1979).

The evidence was sufficient to sustain the convictions of these three appellants.

IV. FALSE STATEMENT COUNTS

The false statement counts are based on statements made in loan applications that the straw purchasers completed.[2/]

2/ 18 U.S.C. §1014 provides in relevant part: "Whoever makes any false statements continued

There were three types of false statements: (1) statements that straw purchasers were the sources of down payment funds; (2) statements that straw purchasers intended to occupy the properties; and (3) Miller's verification, under a fictitious name, that he employed the wife of a straw purchaser.

Harrington, Atkinson and Golden West contend that the statements made about the sources of the down payment funds were literally true, and that they did not know whether the straw purchasers intended to occupy the homes.

In all seven transactions, the escrow instructions recited, "I (the straw

---

2/ or report . . . for the purpose of influencing in any way the action of . . . any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation . . . upon any application . . . or loan . . . shall be fined not more than $5,000 or imprisoned not more than two years, or both".

purchaser) will hand you . . .", followed by a dollar amount. Defendants contend that these statements, literally construed, did not mean that the straw purchaser was making the down payment. However, an industry expert testified that they are not so interpreted by savings and loan associations, and the associations would not have approved the loans if they knew the down payment was made with borrowed funds. There was ample evidence from which the jury could find that Harrington, Atkinson, and Golden West all knew the true sources of the money used as down payments for the straw purchasers. There was other evidence which indicated that Atkinson and Harrington both knew that the straw purchasers did not intend to occupy the homes.

Miller's contention that the evidence is insufficient to support his conviction

for falsely verifying the employment of a straw purchaser's wife is frivolous. He testified that he was told by a bank employee that he could verify the wife's employment himself. Miller, using a false name, stated that he had employed and paid the straw purchaser's wife. There was ample evidence to sustain his conviction on this count.

V. IMPEACHMENT WITH SUPPRESSED STATEMENTS

Before trial, Miller moved to suppress statements he made to FBI Agent Kenneth Freking, which incriminated Atkinson, Harrington, and Golden West. The district court held that the statements were obtained in violation of Miranda v. Arizona, 384 U.S. 435 (1966), and excluded them from the government's case in chief.3/

The government used some of these

3/ Appellants argue that the district court excluded Miller's statements on the ground that they were involuntary. The record shows that the appellants stressed the Miranda violations in their motion to suppress, and that the statements were based on that ground.

statements to impeach Miller on cross-examination. Miller's direct testimony described in detail how his refinancing program worked. On cross-examination, the government asked him whether Harrington and Atkinson knew the details of the scheme. When Miller denied that they did, the government impeached him with the statements he had made to Agent Freking.

Appellants contend that (1) the statements were involuntary, and therefore inadmissible for any purpose under Mincey v. Arizona, 437 U.S. 385, 401-2 (1978), and (2) even if the statements were voluntary, they were improperly used to impeach Miller on issues not raised in his direct examination testimony.

In Mincey v. Arizona, 437 U.S. 385 (1978), the defendant was interrogated in a hospital room several hours after

he had been seriously wounded. He was helpless, confused, and in great pain at the time of questioning. Under such circumstances, the Court held that his statements could not be "the product of a rational intellect and a free will", and the Court suppressed the statements for all purposes.

We have examined the evidence here, and in our view the district court correctly held that the evidence did not show that Miller's will was overborne, or that his statements were coerced. Freking's statements to Miller that he was facing a long prison sentence, and his statements that he was contemplating employing Miller in a new business if he exonerated himself, do not require a different result. United States v. Boyce, 594 F.2d 1246, 1250-1 (9th Cir. 1979). In Boyce, FBI agents held the

defendant in custody and induced him to confess by telling him that a coconspirator was under arrest. The court held that his waiver of his right to remain silent was voluntary.

Statements suppressed because of a Miranda violation may be used to impeach a defendant who takes the stand to testify in his own behalf. Harris v. New York, 401 U.S. 222 (1971). However, the government may not raise issues on cross-examination unrelated to the defendant's direct testimony for the sole purpose of introducing the excluded statements. United States v. Whitson, 587 F.2d 948 (9th Cir. 1978).

In United States v. Havens, 446 U.S. 620 (1980), the evidence indicated that Havens supplied a T-shirt used to smuggle cocaine. Havens, on direct examination, denied any involvement in

the smuggling. On cross-examination, the government was permitted to use the illegally seized T-shirt to demonstrate Havens' participation in the smuggling operation. The court held that impeachment was proper because the issues had been raised on direct examination.

The rule of Havens is applicable here. During Miller's direct testimony, he reviewed the details of each of the seven transactions, including the participation by Golden West. This testimony reasonably suggested the government's inquiry whether Atkinson and Harrington knew of Miller's scheme. Miller's answers were therefore subject to impeachment by the evidence obtained in violation of Miranda. Id. at 627-8.

VI. HEARSAY ERROR

Roland Perkins was the only homeowner who did not testify at the trial.

The district court permitted the straw purchaser of Perkins' home to testify that after the escrow as closed, Perkins said that he did not intend to make the monthly payments on the new loan because they were too high. Miller moved to strike this testimony as hearsay. The district court denied the motion, citing the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E).

The co-conspirator exception requires that the out-of-court statements be made in furtherance of the conspiracy. United States v. Eubanks, 591 F.2d 513, 519-20 (9th Cir. 1979). Here, the statements by Perkins were made after the conspiracy had ended. Even assuming that Perkins was a co-conspirator, his statements did not further the objectives of the conspiracy, and should have been excluded.

The amount of the increase in monthly

mortgage payments was shown by other evidence, and the evidence of Miller's guilt was overwhelming. Perkins' statement was harmless beyond a reasonable doubt.

All the convictions of Miller, Atkinson, Harrington, and Golden West are affirmed.

APPENDIX B

APPENDIX B

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

JOSEPH SINGFIELD MILLER,
SHERRI A. ATKINSON,
GOLDEN WEST ESCROW COMPANY,
EARL J. HARRINGTON,
Defendants-Appellants.

Nos. 81-1287, 81-1331,
81-1332, 81-1333.

United States Court of Appeals,
Ninth Circuit.

Appeal from the United States District Court for the Central District of California, Terry J. Hatter, Jr., District Judge, Presiding.

Before: WRIGHT and SNEED, Circuit Judges, and SOLOMON, Senior District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Wright and Sneed have voted to reject the suggestion for a rehearing in banc,

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.